

D7

U.S. Department of Homeland Security
20 Mass. Rm. A3042, 425 I Street, N.W.
Washington, DC 20529

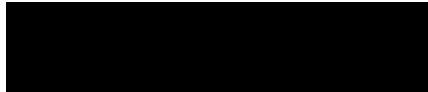


U.S. Citizenship
and Immigration
Services



FILE: SRC 02 239 50517 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Texas Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

According to the documentary evidence contained in the record, the petitioner was incorporated June 19, 2002, and intends to sell "cellular phones, telecommunication, computers and computers hardware for the first year." The petitioner claims that the U.S. entity is a subsidiary of Saima Real Estate, located in Pakistan. It seeks to employ the beneficiary temporarily in the United States as the executive manager of its new office for a period of one year, at an annual salary of \$35,000.00. The director determined that the evidence was not sufficient to establish that: (1) a qualifying relationship exists between the U.S. and foreign entities; and (2) the petitioner had secured sufficient physical premises to house the new office.

On appeal, the petitioner disagrees with the director's determination and asserts that a qualifying relationship does exist between the U.S. and foreign entities, and that it has secured sufficient physical premises to house the new office.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(1)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (1)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that a qualifying relationship exists between the U.S. and foreign entities.

The regulations at 8 C.F.R. § 214.2(1)(1)(ii)(G) state:

Qualifying organization means a United States or foreign firm, corporation, or other legal entity which:

- (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (1)(1)(ii) of this section;
- (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
- (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulations at 8 C.F.R. §§ 214.2(l)(1)(ii) define, in pertinent part, "parent," "branch," "subsidiary," and "affiliate" as:

- (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
- (J) *Branch* means an operation division or office of the same organization housed in a different location.
- (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.
- (L) *Affiliate* means
 - (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
 - (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

In the instant matter, the petitioner claims to be a subsidiary of the foreign entity. The petitioner stated that the U.S. entity was a subsidiary of the foreign entity with a "50/50 ownership." The petitioner initially submitted a copy of the U.S. entity's Articles of Incorporation, which demonstrated that the entity was authorized to issue a total of 1,000,000 shares of stock. The petitioner submitted blank by-laws and stated, "no meetings have been held." The petitioner also submitted a blank stock certificate and a blank stock transfer ledger.

The director determined that additional documentation was needed from the petitioner in order to determine the petitioner's eligibility for the benefits and services sought. The director specifically requested that the petitioner submit evidence of a qualifying relationship between the U.S. and foreign entity.

In response to the director's request for additional evidence, the petitioner stated that [REDACTED] was the owner of the parent corporation and that [REDACTED] was the executive manager of the subsidiary. To substantiate the above statement, the petitioner submitted a letter from [REDACTED] which read: "To whom it may concern; this is to certify that [REDACTED] (Proprietor Saima Real Estate) undertaking in whole sense and give all power to [REDACTED] to deal with all matters regarding my business in United States of America." The petitioner also submitted a copy of a wire transfer notice, dated July 16, 2002, in the amount of \$49,983.00. The petitioner submitted a copy of the U.S. entity's bank summary statement for August of 2002.

The director denied the petition after determining that the record did not establish that a qualifying relationship existed between the U.S. and foreign entities as required by 8 C.F.R. § 214.2(l)(1)(ii)(G). The

director stated that the evidence failed to establish that the foreign entity was related to the U.S. entity as a parent, branch, affiliate, or subsidiary.

On appeal, the petitioner disagrees with the director's decision. The petitioner asserts that the foreign entity owns all of the "100 shares" of stock issued by the U.S. entity. As evidence on appeal, the petitioner submitted a copy of a U.S. company stock certificate, which indicated that 1000 shares of stock had been issued to Saima Real Estate on July 1, 2002. The petitioner also submitted a copy of Minutes and Resolution of Stockholders and Directors, dated July 1, 2002. The petitioner submitted a copy of the U.S. entity's Articles of Incorporation, dated June 19, 2002.

On reviewing the evidence and the petition, the petitioner has failed to submit sufficient evidence to establish a qualifying relationship exists between the U.S. and foreign entities. After the director requested additional documentation on this issue, the petitioner failed to submit sufficient evidence. On appeal, counsel relies on evidence that was requested but not produced until after the initial decision to deny the petition was made by the director. The petitioner submitted a handwritten copy of a U.S. entity stock certificate and a copy of "Minutes Resolution of Stockholders and Directors."

The regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal. The petitioner's new evidence will not be considered and the record as presently constituted does not demonstrate that a qualifying relationship exists between the U.S. and foreign entities. Consequently, the appeal will be dismissed.

The regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between U.S. and foreign entities for purposes of a nonimmigrant visa petition. *Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm. 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra*. In the instant matter, the petitioner has not submitted sufficient proof of stock purchase by the foreign entity. There has been no company by-laws, tax records, stock certificate registry, purchase of shares agreements, bank statements, cancelled checks or any other business documents presented to substantiate purchase of the U.S. entity's stock by the foreign entity.

Furthermore, the record contains a number of inconsistencies regarding the actual purchase of U.S. company stock by the foreign entity. The petitioner initially submitted a blank stock certificate, and on appeal

submitted a stock certificate that had been filled in by hand. In addition, the petitioner initially stated that there had been no meeting among the board of directors or stockholders. However, on appeal the petitioner attempts to submit as evidence, a copy of Meeting Minutes dated July 1, 2002. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In summary, there is no evidence to show that a parent-subsidary relationship exists between the U.S. and foreign entities. Evidence of record fails to demonstrate that the U.S. entity owns, directly or indirectly, more than half of the foreign entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity. There has been no evidence presented to establish who controls company policies and procedures, production, customer service, and advertising with regard to the U.S. entity's operations. Likewise, evidence of record fails to show who owns stock in the U.S. entity. Claims of ownership and control without independent documentary evidence to substantiate such an allegation is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Likewise, the petitioner has failed to establish that there is an affiliate relationship between the U.S. and foreign entities as the record does not show that both entities are owned and controlled by the same group of individuals, each owning and controlling approximately the same share or proportion of each entity.

A second issue in this proceeding is whether the petitioner has secured sufficient physical premises to house the new office.

The petitioner initially stated, "a lease agreement will be signed upon approval of the L-1 visa" petition. In response to the director's request for additional evidence with regard to housing the new office, the petitioner submitted a copy of a lease agreement, dated September 3, 2002. The lease agreement is for a "mini suite" consisting of 144 square feet in space.

The director determined that the evidence submitted was insufficient to establish that the petitioner had secured sufficient physical premises to house the new office.

On appeal, the petitioner resubmits the mini suite lease agreement, dated September 3, 2002. The petitioner also submits a copy of meeting minutes of a joint corporate meeting, dated July 1, 2002.

In review of the evidence, it cannot be concluded that sufficient physical premises have been secured to house the new office. The regulations require the petitioner to submit evidence that establishes that sufficient physical premises to house the new office have been secured at the time the new office petition is filed. See 8 C.F.R. § 214.2(1)(3)(v)(A). In the instant matter, the petitioner initially stated that a lease agreement would not be signed until after the L-1 visa was granted. The lease agreement submitted by the petitioner is dated September 3, 2002, which is subsequent to the filing of the petition. It is noted for the record that the petition in the instant case was filed August 5, 2002. It is also noted that the meeting minutes, dated July 1, 2002, state that a lease agreement had been entered into by the U.S. entity on September 3, 2002, of which the presiding members adopted. This inconsistency in the dates of the lease and the purported meeting lead the AAO to conclude that the petitioner manufactured this evidence in an effort to mislead the director.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho, supra*. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho, Id.* A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp., supra*. CIS cannot consider facts that come into being only subsequent to the filing of a petition. *See Matter of Bardouille, supra*. Furthermore, there was no evidence submitted to show that the premises leased were adequate to house the new office.

In review of the entire record, the petitioner has failed to submit sufficient evidence to establish that it has secured sufficient physical premises to house the new office and that a qualifying relationship exists between the U.S. and foreign entities. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has failed to establish that the foreign entity has been and will continue doing business in a regular, systematic, and continuous manner, as required by 8 C.F.R. § 214.2(I)(14)(ii)(B). There is no evidence of annual reports, company invoices, bills of sale, or other evidence of business conducted by the foreign entity sufficient to show that it is and will be doing business in the absence of the beneficiary. Additionally, there is insufficient evidence of record to show that the petitioner has complied with 8 C.F.R. § 214.2(I)(3)(v) as a new office petition by submitting evidence to establish that sufficient funding or capitalization had been secured by the U.S. entity to commence doing business in the United States. In the instant matter, the petitioner submitted bank statements for both entities and a copy of a wire transfer as evidence. Evidence of a single wire transfer to the U.S. entity is not sufficient to establish that the organization was adequately funded or has received sufficient capital to commence doing business. For this additional reason, the petition may not be approved.

Furthermore, the record does not contain any documentation to persuade the AAO that the beneficiary has been or will be employed in a managerial or executive capacity as defined at section 101(a)(44) of the Act, 8 U.S.C. § 1101(a)(44). There has been insufficient evidence submitted to establish that the beneficiary has performed managerial or executive duties for one consecutive year for a qualifying company abroad, within three years preceding the filing of the petition. In this matter, the petitioner stated that the beneficiary had been employed by the foreign entity since the year 2000 and that his duties consisted of sourcing of high caliber team members and helping to close complex projects. This evidence, alone, is insufficient to establish that the beneficiary was employed by the foreign entity in a managerial or executive capacity for one continuous year within three years preceding the filing of the petition.

Likewise, there is insufficient evidence to show that the beneficiary will be employed by the U.S. entity primarily in a managerial or executive capacity. The petitioner stated in the petition that the beneficiary would be responsible for marketing the services of the organization, managing daily business operations, and handling all banking and financial operations. This statement is too vague and general and does not establish that the beneficiary will be managing the day-to-day operations of the business; supervising subordinate staff whose positions are supervisory, professional, or managerial in nature; or that the U.S. entity will employ subordinate staff who will be able to relieve the beneficiary from performing non-qualifying duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Furthermore, there is nothing in the record to demonstrate that the beneficiary will manage a function of the organization, that the

U.S. entity will be able to remunerate the beneficiary for his services, or that the organization will be able to support a managerial or executive position within one year of operation as defined at section 101(a)(44) of the Act. For these additional reasons, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.